Credit Corp (M) Bhd v Lucky Height Development Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D5-22-720-93
KAMALANATHAN RATNAM JC
22 JANUARY 1996

Civil Procedure *— Summary judgment — Guarantee — Whether presence of a conclusive evidence clause can prevent guarantors from questioning the correctness of the account sought to be produced as conclusive evidence against them — Plaintiff varied interest rate without giving notice to defendants — Whether a triable issue had been raised as to the applicable interest rate and the date the rate was to take effect from*

The plaintiff, on 23 April 1990, had agreed to loan to the first defendant the amount of RM140,000 with interest at 10.5% per annum or 2% above the base lending rate whichever was the higher. The second, third, fourth and fifth defendants as the directors of the first defendant had guaranteed the loan. As the defendants had failed to pay on demand the accrued sum owed, the plaintiff issued a writ and proceeded to apply for summary judgment for the amount of RM165,168.74, inclusive of interest at the rate of 12.5% per annum. The senior assistant registrar ('SAR'), on 21 June 1995, granted the plaintiff summary judgment against the defendants. Therefore, the second, third and fourth defendants appealed against the decision of the SAR. The second, third and fourth defendants averred that the plaintiff had, inter alia, a debenture over all movable and immovable properties of the first defendant and had appointed receivers and managers pursuant to the debenture. They denied owing the said sum, as they averred that the managers and receivers had collected over RM1m from the various purchasers of houses in the project or from their financiers which should be used to pay off the claim for RM165,168.74. The plaintiff replied that the monies collected was used to repay a soft loan granted to the first defendant under the Tabung Projek Perumahan Terbengkalai, which was to be given priority above all other existing secured and unsecured creditors. Further, the defendants contended that charging 12.5% constituted a variation of the base lending rate and since there had been a variation without a notice of such variation being served on the first defendant, there were triable issues as to the applicable interest rate and the date from which the new rate was to take effect.

Held, allowing the appeal:

(1) There was no merit in the point raised by the defendants that the monies collected by the receivers and managers should be sufficient to settle the sum owed to the plaintiff. The receivers and managers have to settle the sum of RM1m collected in order of priority (see p 562H).

(2) No claimant should be allowed to hide behind a conclusive evidence clause and be allowed to make unlawful demands against

its borrowers or guarantors. This is especially so when no notice had been sent, as had happened in this case, because it would be impossible to determine the date from which the varied interest was to be payable. There was also no evidence that the first defendant here had waived the requirement of the notice of variation of the rate of interest. It was, therefore, clear that the presence of a conclusive evidence clause per se, could not prevent the guarantors from questioning the correctness or otherwise of the account sought to be produced as conclusive evidence against them (see p 564C–G; *Moscow Narodny Bank Ltd v New Kok Ann Realty Sdn Bhd* [1989] 3 MLJ 310 not followed; *Oriental Bank Bhd v Jaafar Sidek b Mohd Salam & Ors* [1990] 2 CLJ 72 followed).

(3) The variation of the relevant interest rate without the notice of variation being sent was invalid as the amended rate of interest should be payable and effective only from the date specifed in the notice. Since it was admitted by the plaintiff's counsel that no notice had been sent, it would mean that there had been a wrongful demand for payment of the interest at 12.5% instead of 10.5%. The defendants had, therefore, raised a triable issue and this case ought to go for trial (see p 566A–C; *Co-operative Central Bank Ltd v Meng Kuang Properties Bhd* [1991] 2 MLJ 283 followed).

[Bahasa Malaysia summary

Plaintif, pada 23 April 1990, telah bersetuju untuk meminjamkan kepada defendan pertama wang sebanyak RM140,000 dengan faedah pada kadar 10.5% setahun atau 2% di atas kadar pinjaman dasar yang mana satu lebih tinggi. Defendan kedua, ketiga, keempat dan kelima sebagai pengarah syarikat defendan pertama telah menjamin pinjaman itu. Oleh kerana defendan gagal untuk membuat bayaran di atas tuntutan jumlah yang dihutang, plaintif telah mengisu writ dan memohon penghakiman terus untuk jumlah sebanyak RM165,168.74, termasuk faedah pada kadar 12.5% setahun. Penolong Kanan Pendaftar ('PKP itu'), pada 21 Jun 1995, memberikan penghakiman terus kepada plaintif terhadap defendan. Maka, defendan kedua, ketiga dan keempat merayu terhadap keputusan PKP itu. Defendan kedua, ketiga dan keempat mengatakan bahawa plaintif memegang, antara lainnya, debentur ke atas semua harta alih dan tak alih defendan pertama dan telah melantik penerima dan pengurus untuk debentur itu. Mereka menafikan bahawa mereka masih berhutang jumlah yang dikatakan itu kerana penerima dan pengurus telah memungut lebih daripada RM1 juta dari pembeli rumah dalam projek itu atau dari pembiaya mereka dan wang itu sepatutnya digunakan untuk membayar tuntutan sebanyak RM165,168.74 itu. Plaintif menjawab bahawa wang yang dipungut itu telah digunakan untuk membayar pinjaman berterma mudah yang diberikan kepada defendan pertama di bawah Tabung Projek Perumahan Terbengkalai, yang mana mesti diberikan prioriti di atas

pemberi kredit yang lain sama ada bercagar atau pun tidak. Tambahan lagi, defendan berhujah bahawa pengenaan faedah 12.5% merupakan perubahan pada kadar pinjaman dasar dan oleh kerana terdapat perubahan tanpa notis mengenai perubahan itu disampaikan kepada defendan pertama, terdapat isu-isu yang patut dibicarakan tentang kadar faedah yang terpakai dan tarikh dari mana kadar baru itu berkuatkuasa.

Diputuskan, menolak rayuan itu:

(1) Tidak terdapat merit di dalam isu yang dibangkitkan oleh defendan bahawa jumlah yang diperolehi oleh penerima dan pengurus sepatutnya mencukupi untuk menyelesaikan jumlah yang dihutang kepada plaintif. Penerima dan pengurus harus menyelesaikan jumlah RM1 juta yang dipungut itu mengikut susunan kepentingan (lihat ms 562H).

(2) Pemohon tidak boleh dibenarkan bersembunyi di sebalik fasal keterangan konklusif dan dibenarkan membuat permintaan yang menyalahi undang-undang terhadap peminjam atau penggerenti, lebih-lebih lagi, seperti yang telah berlaku di dalam kes ini, jika notis tidak diberikan kerana tarikh dari mana kadar faedah baru harus dibayar tidak dapat dipastikan. Juga tidak terdapat keterangan bahawa defendan pertama telah menepikan keperluan untuk notis perubahan kadar faedah itu. Ia adalah, oleh itu, jelas bahawa dengan kehadiran fasal keterangan konklusif itu sahaja, tidak boleh menghalang penggerenti daripada menyoal sama ada akaun yang dikemukakan di mahkamah sebagai keterangan konklusif terhadap mereka itu betul atau tidak (lihat ms 564C–G; *Moscow Narodny Bank Ltd v New Kok Ann Realty Sdn Bhd* [1989] 3 MLJ 310 tidak diikut; *Oriental Bank Bhd v Jaafar Sidek bin Mohd Salam & Ors* [1990] 2 CLJ 72 diikut).

(3) Perubahan pada kadar faedah yang berkenaan tanpa notis perubaha itu dihantar adalah tak sah kerana kadar faedah yang baru hanya perlu dibayar dan berkuatkuasa mulai daripada tarikh yang dinyatakan di dalam notis itu. Oleh kerana ia telah diakui oleh peguam plaintif bahawa tiada notis dihantar, ini bermakna bahawa terdapat tuntutan untuk pembayaran yang salah pada kadar faedah 12.5% padahal ia sepatutnya 10.5%. Maka, defendan telah membangkitkan isu yang patut dibicarakan dan kes ini harus maju ke perbicaraan (lihat ms 566A– C; *Co-operative Central Bank Ltd v Meng Kuang Properties Bhd* [1991] 2 MLJ 283 diikut).]

Notes

For cases on summary judgment in guarantee cases, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3323–3326.

Cases referred to

Bank Bumiputra Malaysia Bhd v Esah bte Abdul Ghani [1986] 1 MLJ 16

Co-operative Central Bank Ltd v Meng Kuang Properties Bhd [1991] 2 MLJ 283

Lee Tai Hoo & Anor v Lee Swee Keat & Anor [1987] 1 MLJ 304

Moscow Narodny Bank Ltd v New Kok Ann Realty Sdn Bhd [1989] 3 MLJ 310

Oriental Bank Bhd v Jaafar Sidek bin Mohd Salam & Ors [1990] 2 CLJ 72

Legislation referred to

Companies Act 1965
National Land Code 1965 s 256
Rules of the High Court 1980 O 14

SY Ng (*Raja Darryl & Loh*) for the plaintiff.
Francis Lim (*Francis Lim & Co*) for the defendants.

Cur Adv Vult

Kamalanathan Ratnam JC: This is an appeal by the second, third and fourth defendants against the decision of the learned senior assistant registrar ('SAR') who on 21 June 1995 granted the plaintiff judgment against the said defendants in an O 14 Rules of the High Court 1980 application.

The plaintiff was at all material times a finance company. By way of a loan agreement dated 23 April 1990, the plaintiff agreed to loan the first defendant RM140,000 for the development of a housing estate known as Taman Anggerik, Seremban ('the project').

It was pleaded in the plaintiff's statement of claim that by a guarantee, also dated 23 April 1990, the second, third, fourth and fifth defendants being the directors of the first defendant guaranteed payment on demand of all monies provided that the total sum recoverable exclusive of interest was limited to the sum of RM140,000. As the defendants had failed to pay on demand the accrued sum of RM116,645 as the principal, RM41,656.58 as interest at 12.5% per annum with monthly rests from 1 April 1993 making a total of RM165,168.74, the plaintiff issued out the said writ and proceeded by way of an O 14 application for summary judgment.

In its statement of claim and application for summary judgment, the plaintiff prayed for judgment for RM165,168.74 with interest at the rate of 12.5% per annum with monthly rests from the first day of April 1993 till the date of realization. The said loan agreement and the guarantee were tendered as exhibits in support.

The second, third and fourth defendants vide their affidavit in reply averred that the plaintiff had a first legal charge on nine pieces of land

belonging to the first defendant and a debenture dated 23 April 1990 over all movable and immovable properties of the first defendant. The plaintiff had on or about 22 May 1991 appointed receivers and managers pursuant to the debenture dated 23 April 1990. The defendants averred that the said receivers and managers had to date, not submitted any financial reports to the Board of Directors of the first defendant. They also denied owing the said sum, as they averred that the managers and receivers had received/collected over RM1m from the various purchasers of houses in the project or from their financiers.

It was the contention of the second, third and fourth defendants that the receivers and managers having acted under the said debenture and having collected approximately RM1m, had failed to account for the monies collected and failed to discharge all or any outstanding debts due to the plaintiff by the first defendant.

According to the plaintiff, the first defendant had obtained a soft loan of RM1,050,000 under the Tabung Projek Perumahan Terbengkalai ('the Tabung'). It was a term fixed by Bank Negara that such a loan under the Tabung be given priority above all other existing secured and unsecured creditors. The loan in this case was also provided by the plaintiff who was also advised by Bank Negara to appoint receivers and managers for the project vide its letter dated 13 April 1991 to the plaintiff. Hence, the plaintiff averred that payments due to the first defendant from the purchasers of the housing project were paid into the receivers and managers' account and that they were obliged to make preferential and priority payments in accordance with the provisions of the Companies Act 1965 and to all other preferential creditors before effecting any payment to the plaintiff including payment of the loan to the Tabung. The plaintiff further averred that the interest chargeable by them was strictly in accordance with the terms and provisions of the loan agreement and that the plaintiff's base lending rate ('BLR') on 1 April 1993 was 10.5% per annum.

Subsequently, the plaintiff filed another affidavit through its manager of the loan rehabilitation and recovery department affirming that the figures and sums stated in its affidavits and supporting documents were derived from the entries in the plaintiff's ledger and statement of account, which was at all material times one of the ordinary books of the plaintiff and which entries were made in the usual course of business.

When this appeal came before me on 4 December 1995, only counsel for the plaintiff, Miss SY Ng, appeared. Mr Lim, for the defendants, did not attend but sought to convey a message to the court that there was a high possibility of a settlement. In the circumstances, it was his view that it would be inconvenient for him to drive down from Seremban only to adjourn this case.

The conduct of the defendants' counsel pre-supposed that this court would grant an adjournment. This was a 1993 matter and there was no evidence before the court of any of the terms of any proposed settlement. The court being loathe to adjourn matters on the arbitrary assumption of counsel stood down the matter to 2pm. However, since Mr Lim could not be contacted, the court reluctantly adjourned the hearing to 14 December 1995.

A On 12 December 1995, both counsel again sought an adjournment with a view to a settlement but since the request for an adjournment was for the same reason given earlier, the said request for any further adjournment was rejected and the appeal proceeded.

The defendants' first contention was that since the receivers and B managers appointed by the plaintiff had received a sum totalling approximately RM1m and this claim being only for RM165,168.74 it ought to have been paid off from the RM1m already collected. To date, there had been no explanation proffered by the plaintiff as to why the sum of over RM1m already collected was not used to settle this debt of the first defendant.

C In reply to the defendants' first contention, counsel for the plaintiff referred the court to various sections in the guarantee which clearly stipulated that the guarantors were not released of their obligations by any discharge, release, modification or abstention by the plaintiff. In any event, she argued that based on the loan guarantee by the Tabung, the said loan D also took priority.

The second point raised by the defendants' counsel was in regard to the rate of interest chargeable. He referred the court to s 6.01 of the loan agreement dated 23 April 1990 which referred to interest. The same is reproduced hereunder:

E Section 6.01 Interest

6.1.1 The borrower shall pay to the finance company interest at the relevant interest rate for all monies drawn down by the borrower and all such other sum for the time being due and owing from the borrower to the finance company which rate is calculated with monthly rests and such interest to accrue on all monies outstanding F on the term loan before as well as after any judgment or order that may be made against the borrower.

6.1.2 The finance company may from time to time and in its absolute discretion vary the relevant interest rate by serving a notice in writing to the borrower, such variation to be effective on the date G specified in such notice.

6.1.3 The relevant interest rate payable on all monies drawn by the borrower on the term loan or the amount thereof from time to time outstanding shall for the time being be at the rate of 10.5% per annum or 2% per annum over and above the finance company's prevailing base lending rate calculated on monthly rest basis H (whichever is the higher).

In the annexure to the charge executed by the first defendant to the plaintiff, similar provisions had been made and are set out hereunder:

1 The chargor(s) will on demand pay to the lender:

I (1) the said sum of RM140,000 ('loan' which expression shall include wherever the context so permits any balance or part thereof) together with interest thereon (as well after as before any court order or judgment) at the rate of 10.5% per annum or 2% per annum over and above the lender's base lending rate on a monthly reducing

basis (whichever is higher) ('prescribed rate' which expression shall include where and when applicable such other rate as may from time to time be substituted therefore in the manner hereinafter provided) and until demand as aforesaid to repay the loan and interest thereon at the prescribed rate by the instalments at the times and in the manner as stipulated in the loan agreement dated 23 April 1990 made between the chargor(s) of the one part and the lender of the other part ...

Interest

Variation of interest rate

3 Notwithstanding the provisions relating to the rate of interest as hereinbefore provided the lender shall be entitled at any time and from time to time to vary at its discretion such rate of interest by serving a notice in writing on the chargor(s) of such intention and such amended rate of interest shall be payable as from the date specified in the said notice. Service of such notice shall be effected in the same manner as a notice demanding payment of the balance due as hereinbefore provided.

The defendants' counsel contended that charging 12.5% constituted a variation as the BLR was 10.5%. Since there had been a variation of the interest rate without a notice of such variation pursuant to s 6.1.2 of the loan agreement being given to his client, he argued that this constituted a triable issue.

Miss Ng argued that s 6.1.3 of the loan agreement clearly stated that the relevant interest rate would be calculated either at the rate of 10.5% per annum or 2% above the plaintiff's prevailing BLR whichever was the higher. She contended that there had never been any variation of the interest rate charged as the plaintiff had averred in para 14 of its affidavit affirmed on 6 April 1994 that the BLR was 10.5% per annum on 1 April 1993 and that there was no affidavit by the defendants rebutting such averment.

Miss Ng referred me to *Bank Bumiputra Malaysia Bhd v Esah bte Abdul Ghani* [1986] 1 MLJ 16 (SC) wherein the Supreme Court held that a court had no jurisdiction to either dismiss or stay a creditor's petition filed against a guarantor even before the hearing of the creditor's petition against the principal debtor. I do not think this is in issue here. It has never been the submission of the defendants that any action against them ought to be stayed until the disposal of the matter against the first defendant.

The court is of the view that there is no merit in the first point raised by the defendants. The court finds that the receivers and managers have to settle the sum of RM1m collected in order of priority.

In respect of the second point raised by the defendants, the court finds that there is no substance upon the premise on which the defendants launched their attack. Section 6.1.3 clearly states that the plaintiff was entitled to charge 2% above the BLR. Had the BLR been 10.5% as alleged by the plaintiff then the plaintiff's claim for interest at 12.5% would be correct. However, at the close of submissions by both counsel, the court drew both counsel's attention to the plaintiff's exh MH-7 in support of its

affidavit affirmed on 6 April 1994 in which the plaintiff had exhibited a 'Term loan — Work sheet' which showed the following entry:

Approved advance	RM140,000
10.5%	
@ Rate 2% above BLR	NB 2% above BLR or 10.5%
(8.5 currently)	whichever is higher
Monthly	

Neither counsel addressed the court further on this except that the plaintiff's counsel agreed that if the BLR then was 8.5% then no notice of variation had been given when the BLR was varied to 10.5% as alleged in the same affidavit.

I find that the terms of the loan agreement and annexure to the charge are clear. The relevant interest rate was fixed at 10.5% or 2% above the BLR whichever being the higher. At the time of execution of the loan agreement on 23 April 1990, the relevant interest rate was fixed at 10.5%, because, as is clearly borne out by exh MH-7, the prevailing BLR of the plaintiff was 8.5%. Hence 2% above the BLR of 8.5% then would give the relevant interest rate of 10.5%. Hence, even though there is no affidavit as pointed out by Miss Ng to rebut the plaintiff's contention that the BLR was 10.5%, this court finds that the plaintiff's own exh MH-7 had rebutted that contention.

Further, since the plaintiff had averred that the statements of accounts including the work sheet reflect the true entry in their books of account kept for business purposes, this court is unable to ascertain as to what rate of interest had been used to work out to arrive at the amounts claimed by the plaintiff. The court does not know whether the interest charged was 8.5% with the additional 2% or whether the interest claimed was based on 10.5% with the additional 2%.

In *Lee Tai Hoo & Anor v Lee Swee Keat & Anor* [1987] 1 MLJ 304, 310, Edgar Joseph Jr J (as his Lordship then was) was of the view that a judge could do his own research 'for the proper clarification and determination of the factual and legal issues in the case'.

In *Moscow Narodny Bank Ltd v New Kok Ann Realty Sdn Bhd* [1989] 3 MLJ 310 at p 313, LC Vohrah J in deciding an application under s 256 of the National Land Code 1965 for an order for the sale of lands charged to the bank held as follows:

> Clause 2 provided for interest to be paid on the principal 'at the rate of eight and a half per centum (8½%) pa or at such other rate or rates as may be imposed by the bank from time to time with monthly rests' and cl 4 provided that 'the bank shall be entitled at any time and from time to time to vary at its discretion such rate of interest by serving a notice in writing on the chargor(s) and/or the borrower(s) such of its intention and such amended rate of interest shall be payable as from the date specified in the notice'. As it was admitted by the plaintiff's senior credit officer, Tan Chee Cheong, in cross-examination that no notice was sent either to the defendant or Mosbert, counsel for the defendant stated that any interest leviable could not exceed 8½% pa. There has been no evidence or allegation that any interest had been

improperly imposed by the plaintiff and it is also not disputed that at the time when the notice of demand dated 20 February 1967 was given (see encl 2, exh P2), Mosbert was already in liquidation and its affairs were managed by the official receiver of Hong Kong so that no purpose would have been served if the notice of variation had been sent either to Mosbert or the defendant. In any event, I am of the view that in the absence of fraud, by virtue of cl 2 'the statement of the manager, assistant manager, sub-manager, accountant or any other officer of the bank as to the amount of such balance shall be final and conclusive'. I agree with counsel for the plaintiff that the defendant cannot now argue that the amount stated by the plaintiff as being due is not correct.

With respect, this court is unable to agree with the learned judge's interpretation of cl 2. I hold that no claimant should be allowed to hide behind a conclusive evidence clause and be allowed to make unlawful demands against its borrowers or guarantors. This is especially so when it is admitted by the claimant's own officers that no notice had been sent. Such being the case, it is well nigh impossible to determine the date from which the varied interest is to be payable, it being clearly and expressly stated in cl 4 above that 'such amended rate of interest shall be payable as from the date specified in the notice'.

Further, it cannot be argued that notwithstanding the fact that since there had indeed been a reduction in the interest rate charged as compared to the agreed rate, no notice to vary need be issued. The objections on principle must remain or otherwise there would be nothing to prevent the plaintiff from first reducing the rate of interest and then increasing it and not giving notice. In any event, there was no evidence that the first defendant had waived the requirement of the notice of variation of the rate of interest.

I am fortified with regard to the view I hold that the presence of a conclusive evidence clause per se, cannot prevent the guarantors from questioning the correctness or otherwise of the account sought to be produced as conclusive evidence against them when I refer to the decision of Siti Norma Yaakob J (as her Ladyship then was) where she held in *Oriental Bank Bhd v Jaafar Sidek bin Mohd Salam & Ors* [1990] 2 CLJ 72 at p 73:

> Under cl 1 of the guarantee, the defendants had agreed to pay interest at the rate or rates for the time being agreed between the first defendant and the plaintiff. It is not disputed that such rate was agreed at 3.75% per annum above the plaintiff's base lending rate. There is documentary evidence to show that the plaintiff's base lending rate had been reduced to 7% per annum in which case the plaintiff is only entitled to charge interest at 10.75% and not 13.75% as is now claimed.
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> In the light of such apparent likelihood of the first defendant's account being incorrect, the application cannot be intended to have the effect of circumventing cl 19 of the guarantee. For the clause to operate against the defendants, the plaintiff must first establish that any certificate it issues on the first defendant's indebtedness can be accepted as correct and I consider that this is a condition precedent which must be fulfilled by the plaintiff. In this case, the defendants have given me good reasons to question the accuracy

of the plaintiff's certificate issued under cl 19, and under such circumstances, I consider that the certificate can no longer be regarded as being conclusive as evidence against the defendants in these proceedings.

It is most unfortunate that the *Moscow Narodny Bank* case was not referred to her Ladyship for consideration.

In *Co-operative Central Bank Ltd (In receivership) v Meng Kuang Properties Bhd* [1991] 2 MLJ 283, there was an application by the plaintiff bank ('CCB') for an order for the defendant company ('MK') to show why the charged land registered in the name of MK and charged to CCB could not be sold by public auction under the direction of the court for the recovery of the sum of RM15,477,187.99 only being principal, interest and other dues on the said charge as at 8 January 1988. Lim Beng Choon J had to consider whether the requisite notice as required under cl 5 of the charge annexure in relation to default interest had been served on either the borrower or MK, as the chargor.

Clause 5 provided that 'any excess amount shall be subject to the default charges at one and one third (1⅓) times of the above interest rate and shall take effect from the date prescribed in the notice'. In his decision at p 288 in respect of this point, the learned judge held as follows:

> ... the opening balance of the loan account with normal interest as at 1 January 1988 was RM14,945,578.98 while the opening balance of the loan account with the normal interest and default interest as at that day was RM15,406,369.74.
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> The figure of RM15,477,187.99, as mentioned in both the notices of demand, must therefore reflect the balance of the loan account with normal and default interest. In short, the sum demanded by the plaintiff company in their notices of demand must have included the element of default interest. Now, cl 5 of the charge annexure required a notice to be served before any default interest could be imposed and there is no evidence to show that such notice had in fact been given either to the borrower or the defendant company, as chargor. Indeed, when defence counsel in his submission suggested that there was no evidence to show that such a notice had been given, the plaintiff's counsel said that the plaintiff bank would abandon the prayer for default interest and the issue of lack of notice should go for trial. But the court could grant an order in terms of the remaining prayers in the originating summons. With due respect, I cannot agree with the suggestion of the plaintiff's counsel. From the evidence before me there is clearly nothing to show that the plaintiff bank had given the requisite notice for if it were otherwise they could have easily produced the same particularly when they were fully aware that the defendant company had in their affidavit averred that 'the plaintiff had not established their entitlement to default interest'. In failing to deny, contradict or challenge the allegation made by the defendant company it must be held that the allegation is admitted — see *Tyne v Buller* (1854) 23 LJ Ch 504. Under the circumstances, I am impelled to hold that the wrongful demand for payment of the default interest to which the plaintiff bank is not entitled must necessarily render the notice of demand and the Form 16D ineffectual and invalid. It is not a simple case of the said notices of demand containing an erroneous sum but it is a case where the said notices were demanding payment of something to which the plaintiff bank had no right to.
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> ... The matter must go for trial.

I agree with the principle laid down in the case cited above. Applying the said principle to the present case, it is clear that the variation of the relevant interest rate from 10.5% to 12.5% without the notice of variation being sent as provided for clearly in s 6.1.2 of the loan agreement and cl 3 of the charge annexure, is invalid as the amended rate of interest shall be payable and effective only as from the date specified in the notice. Since it is admitted by Miss Ng that no such notice had been sent, it would mean that there had been a wrongful demand for the payment of the interest at 12.5% instead of 10.5%.

The defendants have, therefore, raised a triable issue and this case ought to go for trial. In arriving at this conclusion, I am not unmindful of the guidance given me by the Supreme Court in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 (SC).

I, therefore, allow the appeal and set aside the decision of the learned SAR dated 21 June 1995 with costs. As this matter has been long pending, I shall fix an early date for trial.

Appeal allowed.

Reported by Pearl Wee